IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

FAO.No. 233 of 2003()

AS.57/1998 of DISTRICT COURT, PALAKKAD
OS.93/1991 of PRINCIPAL SUB COURT, PALAKKAD
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APPELLANT(RESPONDENT/PLAINTIFF):

P.V.R.KUTTY MENON, S/O.KARTHIYANI AMMA,
10/530, COLLEGE ROAD, PALAKKAD.

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.JOJI VARGHESE
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE

RESPONDENT: APPELLANT/IST DEFENDANT:

RAMACHANDRAN, S/O.NAVALLIKALATHIL,
BHARGAVI AMMA, ANNAVALLIKALAM,
ELAMPULLISSERY, KANJIKULAM, MANNARKKAD TALUK.

BY

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 30/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

KSS

K.PADMANABHAN NAIR, J.

F.A.O.No. 233 of 2003

Dated this the 30th October, 2007.

J U D G M E N T

The plaintiff in O.S.No.93/1991, on the file of the Sub Court, Palakkad, who was the respondent in A.S.No.57/1998, on the file of the District Court, Palakkad, is the appellant herein. The appeal is filed against an order of remand passed by the lower appellate court, by which the decree and judgment passed by the trial court in O.S.No.93/1991 was set aside. The case was remanded for fresh disposal, in accordance with law, after giving an opportunity to the appellant-plaintiff-to measure out the suit properties with reference to Ext.A1 final decree and by survey measurements.

2. The short facts necessary for the disposal of the appeal are as follows. The appellant filed the suit for recovery of possession of plaint B schedule property on the strength of his title. It was averred that plaint B schedule property was part of plaint A schedule property, which was allotted to the thavazhy the plaintiff, as per a decree passed in O.S.No.227/1945. O.S.No.227/1945 was a suit filed for partition and separation of the family properties.

Subsequently, brother of the plaintiff created some documents in order to defeat the interest of the plaintiff. Plaintiff got reconveyance of the properties in the name of his sister and their children in the year 1961. The plaintiff purchased the property from them for valuable consideration. According to the plaintiff, he is in exclusive possession of the same. It was averred that plaintiff-appellant permitted Kuttikrishnan Nair and his wife to put up a building and reside in that property. He also allowed them to conduct a provision store in the building. Plaintiff was made to believe that property tax was being paid in his name. Kuttikrishnan Nair died on 28.7.1988, and his wife on 18.12.1990. Plaintiff's sisters were also residing in that house, and the plaintiff was away in connection with his business. It was averred that taking into advantage of the old age of the sisters of the plaintiff, the defendant started residing in that building. Sisters of the plaintiff were also forcefully evicted and the first defendant was in exclusive possession of the same. It was also averred that certain documents were brought into existence by the defendants to make it appear that Ammunni Amma's right was transferred to defendants. It was contended that sale deed was void. Hence, the suit for recovery.

3. Respondent filed a written statement denying the plaintiff's title and his right to recovery B Schedule property. According to him, plaint B Schedule does not form part of plaint A schedule property. It does not form part of the property allotted to the plaintiff's thavazhy in the family partition. Plaint B schedule was a part of the properties set apart to the share of one Narayanan Nair, on whose death his heirs sold the property to Damodharan Nair, another family member, who gave the same to Ammunni Amma, before 30 years before the date of filing of the suit. It was given under a tenancy right to Ammunni Amma to put up a house. Ammunni Amma put up a house and resided there. She planted certain trees in that property. First defendant purchased the property from Ammunni Amma in the year 1990, and from that date onwards, he is in possession of the property as its absolute owner. It was also contended that even assuming that plaintiff had any title, the same was lost for adverse possession and limitation. The averment that Kuttikrishnan Nair created fraudulent document and there was subsequent reconveyance etc. were denied. Plaintiff's case that he permitted his predecessor-in-interest of the defendants to put up a building therein was also denied. The averment that the first defendant trespassed into the property was also denied. The Trial

Court decreed the suit. Challenging the decree and judgment, first defendant filed A.S.No.57/1998, before the District Court, Palakkad. The learned District Judge set aside the decree and judgment passed by the trial court, and remanded the matter. This appeal is filed challenging that order of remand.

4. At the time of admitting the appeal, no substantial questions of law were framed. Subsequently, appellant filed a memo on 15.10.2007 seeking permission to raise substantial questions of law. The following substantial questions of law were framed:-

> "a) When the parties had no dispute with regard to the identity of the property involved in the case in as much as none of the parties had objected to the report and plan submitted by the Commissioner identifying the property, whether it was necessary for the lower appellate court remand the matter to the trial court for a fresh identification after fresh measurement of the suit property with reference to certain documents.
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> b) Whether under the facts and circumstances of the case, the order of remand made by the lower appellate court is justified.
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> c) When the matter could have been decided even without a further measurement of the property as now suggested by the lower appellate court, was the lower appellate court

justified in remanding the matter to the trial court for the issue of a fresh commission for a fresh measurement of the property.

d) When the evidence already on record was more than sufficient to decide the appeal, was the appellate court justified in remanding the case for further evidence, that too without any discussion or consideration of the matter on the basis of the materials already on record."

5. The appeal was heard on the questions of law so framed. The case of the plaintiff is that plaint B schedule is a portion of 47 cents of land with a house. The properties originally belonged to the family of the plaintiff. O.S.No.227/1945 was filed for partition of the family properties. Ext.A1 is the copy of the final decree passed in that suit. Plaint P schedule properties in Ext.A1 final decree was allotted to the branch of plaintiff. The specific case put forward by plaintiff is that plaint B Schedule property is included in Item No.4 in P schedule allotted to his branch. His brother created a document in favour of Ammunni Amma, who was his wife, as evidenced by Ext.A2, on 14.7.1956. Ammunni Amma sold the right to his sister as per Ext.A3 document, dated 30.11.1961, and thereafter, the vendees under that document released their right in favour of the plaintiff.

6. The claim of the plaintiff is that plaint A schedule is part of plaint B schedule property. It was disputed by the defendants. In the written statement, it was contended that the disputed land form part of the property allotted to one Narayanan Nair. Before the appellate court, counsel for the appellant raised a contention that plaint B schedule form part of plaint K schedule property in Ext.A1 final decree. The first defendant claimed title to and possession of the properties under the allotees of K schedule in the partition deed. The crucial question that arose for consideration before the trial court, as well as the lower appellate court was that whether plaint A schedule is part of B schedule and whether it form P Schedule or K schedule in Ext.A1 decree. The lower appellate court opined that in Ext.C2 plan does not state that plaint B schedule is part of A schedule properties, and came to the conclusion that properties were not measured out with reference to plots in Ext.A1 final decree. The lower appellate court also held that without such measurement, it is not possible to decide whether B schedule is part of A schedule. Apart from making a statement that plaint schedule properties were not measured out with reference to Ext.A1 final decree, the lower appellate court has not given any reason for coming to such a conclusion.

7. The learned counsel appearing for the appellant-plaintiff has pointed out that trial court in paragraph 8 of its judgment found that the cardinal question that arise for consideration is whether plaint B schedule forms part of P schedule or K schedule to Ext.A1. It is argued that the trial court had elaborately discussed that issue in paragraphs 9 to 16, and came to the conclusion that it was part of the property allotted to appellant-plaintiff. It is argued that the plaintiff never wanted a remand for the purpose of identifying the properties. It is further argued that the trial court not only considered Exts.C1 and C2 reports, but also considered the oral and documentary evidence available on record, to decide the identity of the property. A perusal of the judgment of the lower appellate court shows that apart from referring Ext.C2 report and Ext.C2(a) plan, it has not discussed any other evidence.

8. The learned counsel appearing for the appellant has argued that plaintiff is prepared to take the risk. It is also argued that if the defendants wanted to get the properties identified, they ought to have filed an application to depute a Commissioner before the appellate court, instead of asking for a remand. It is pointed out that suit was filed in the year 1991, and it was decided and disposed of on

30th September, 1997, and the appeal was pending from 1998 onwards, and in the year 2003, the lower appellate court remanded the matter, which will only cause hardship to the parties.

9. A perusal of the judgment of the lower appellate court shows that it has not considered the pleadings and evidence. It is trite law that judgment may be brief but not blank. The decision of first appellate court, being a final Court of Act, should contain the reasons. The lower appellate court ought to have considered the entire evidence and took a decision and considered whether it can finally dispose of the matter by itself. So, I have no other option, but to set aside the order of remand, and direct the lower appellate court to hear and dispose of the appeal, on its merits. I make it clear that I am not expressing any opinion regarding the merits of the contentions raised by both sides, and it is for the lower appellate court to consider and take a decision.

In the result, the appeal is allowed. The judgment passed by the lower appellate court on 13.8.2003, in A.S.No.57/1998, setting aside the decree and judgment passed by the trial court and remanding O.S.No.93/1991 back to trial court, is hereby set aside.

The lower appellate court is directed to take A.S.No.57/1998 back to file and dispose of the same, in accordance with law, after hearing both sides, as expeditiously as possible.

The parties shall appear before the lower appellate court on 15.12.2007.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

F.A.O.No. 233 of 2003

J U D G M E N T

Dated: 30th October, 2007.